Post Tension of Nevada, Inc. *and* District Council of Iron Workers of the State of California and Vicinity. Case 28–CA–21886

January 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On October 28, 2008, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent also filed limited cross-exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Charging Party has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find no merit to the Respondent's limited cross-exception that the judge improperly incorporated by reference into his decision the findings of fact and conclusions of law set forth in *Post Tension of Nevada, Inc*., 352 NLRB 1153 (2008). See, e.g., *Steel Workers (Doxsee Food)*, 281 NLRB 1275, 1278 (1986), and cases cited therein.

In agreeing to adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) when Superintendent Matt Pickens allegedly told Union Representative Brady Bratcher that he was "causing trouble or problems," Chairman Liebman does not rely on the judge's reasoning that the statement was made solely to Bratcher, rather than directly to unit employees. Instead, she finds that the record does not support the theory that the General Counsel alleged before the judge (and that the Charging Party adopts in its exceptions), specifically, that Pickens' statement constituted a statement that it would be futile for unit employees to exercise their statutory rights.

No exceptions were filed to the judge's findings of 8(a)(1) violations. Member Schaumber agrees with the judge's finding that the strike engaged in by employee Leobardo Delgado on April 10, 2008, was not an unfair labor strike. He finds it unnecessary to pass on the balance of the judge's analysis of the 8(a)(3) allegation.

[3] We shall substitute a new notice to conform to the language set forth in the Order and the Board's standard remedial language.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Post Tension of Nevada, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT orally promulgate and maintain an overly-broad and discriminatory rule that prohibits employees who are working from telling striking employees where crews of our employees are working.

WE WILL NOT orally promulgate and maintain an overly-broad and discriminatory rule that prohibits employees from speaking to agents of the Union.

WE WILL NOT create an impression among our employees that their union activities or other protected concerted activities are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

POST TENSION OF NEVADA, INC.

Chris J. Doyle, Esq., for the General Counsel.
James T. Winkler, Esq., of Las Vegas, Nevada, for the Respondent.
David A. Rosenfeld, Esq., of Alameda, California and *Brady Bratcher, Campaign Coordinator,* of Pinole, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, on August 6 and 7, 2008. District Council of Iron Workers of the State of

California and Vicinity (the Union or the Charging Party) filed an unfair labor practice charge in this case on April 22, 2008. Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the complaint) on June 27, 2008. The complaint alleges that Post Tension of Nevada, Inc. (the Respondent or the Employer) violated Section 8(a)(1) and (3) of the Act. The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices and raising a number of affirmative defenses.[1]

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel[2] and counsel for the Respondent, and my observations of the demeanor to the witnesses, I now make the following[3]

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent, a Nevada corporation, with an office and place of business in Phoenix, Arizona (the Respondent's facility), has been engaged in the business of fabricating and installing stress cables in the construction industry. Further, I find that during the 12-month period ending April 22, 2008, the Respondent purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The underlying dispute in this case had its inception in an earlier unfair labor practice charge, which was the subject of a decision issued on April 18, 2008, by Administrative Law Judge Lana H. Parke. Subsequently, the Board issued a decision in *Post Tension of Nevada, Inc.,* 352 NLRB 1153 (2008), in which, for the most part, it affirmed the judge's rulings, findings, and conclusions. Accordingly, I have taken administrative notice of that earlier case, and hereby incorporate by reference into my decision the findings of facts and conclusions of law as set forth by the judge and affirmed by the Board.[4]

As found by Judge Parke, the Respondent's construction projects in the Phoenix metropolitan area were staffed by field crews, each consisting of a foreman and a varying number of laborers. The Respondent's workday practice in the Phoenix area was for the field crews to report to the Phoenix facility, receive their work assignments, and depart for their specific worksites. Each crew was transported by its respective foreman in the foreman's personal vehicle. Enroute to the worksite, most crews typically stopped at a nearby Chevron gas station/mini market (Chevron station) where the crew foremen fueled their vehicles while crew members purchased food and socialized, spending 20–30 minutes there. Further, having established check-cashing privileges at the Chevron station, many crew members cashed paychecks there on payday mornings.

Beginning in 2005, Brady Bratcher, an organizer for the Union, began efforts to organize the Respondent's laborers. For that purpose, in early 2007, he began visiting the Chevron station where Bratcher knew that many employees gathered before dispersing in crews to individual worksites.

Judge Parke found that in September 2007, Matt Pickens, the Respondent's superintendent, told the field foremen not to take the laborers to the Chevron station where they were likely to meet Bratcher and that he told them that the Respondent would no longer distribute paychecks on Friday mornings to further discourage employees' interaction with the Union. Thereafter, the foremen communicated Pickens' prohibitions to the field employees.[5] Judge Parke, with the Board affirming, concluded that the foremen's communication to the laborers of the prohibition banning the customary morning Chevron station stops was an overly broad and discriminatory rule, which interfered with employee protected activity. As such, it constituted a violation of Section 8(a)(1) of the Act. Further, the Board held that the prohibition against going to the Chevron station also reasonably tended to impede and discourage employee concerted activity, in violation of Section 8(a)(1) of the Act.

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[1] All pleadings reflect the complaint and answer as those documents were finally amended.

[2] Counsel for the Union filed a posthearing "Joinder in Brief," in which he joins in the brief of the General Counsel.

[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 US. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[4] During the hearing in this case, I informed the parties of my intention to incorporate by reference into my decision the findings of fact and conclusions of law as found by Judge Parke in the earlier case. Further, I alerted the parties that I was going to consider those findings of fact and conclusions of law as res judicata for the purpose of resolving the issues pending before me. To have done otherwise could have resulted in conflicting opinions by different judges, based on the same exact facts. I took this position over the objection of counsel for the Respondent. According to counsel, the Respondent had filed exceptions to certain of Judge Parke's findings of fact and conclusions of law, which exceptions were pending on appeal to the Board. However, since the conclusion of the hearing, the Board has issued its decision, largely affirming the judge. Accordingly, the findings of fact and conclusions of law, as adopted by the Board in the earlier case, are now clearly res judicata, and are biding on the undersigned and the parties.

[5] Matt Pickens was found to be a supervisor and agent of the Respondent within the meaning of Sec. 2(11) and (13) of the Act, and the Respondent's field foremen to be supervisors within the meaning of Sec. 2(11).

Judge Parke also found that in September 2007, Matt Pickens and Javier Loya Bando,[6] the Respondent's assistant superintendent, told field employees that they were changing the paycheck distribution practice to prevent the employees from interacting with Bratcher at the Chevron station. The judge concluded, with the Board affirming, that by making such statements, ascribing an unlawful motive to a change in the paycheck distribution practice, the Respondent was coercing its employees in the exercise of their Section 7 rights. It, therefore, constituted a violation of Section 8(a)(1) of the Act.

On September 20, 2007, certain of the Respondent's field employees engaged in a work stoppage. That work stoppage was protected by Section 7 of the Act, as in furtherance of the employees "mutual aid and protection." Judge Parke found that by informing those employees that he would assume they were quitting if they unloaded their tools and did not go to work that morning, Pickens was threatening them with termination for participating in a strike. The judge concluded, with the Board affirming, that such a threat was a violation of Section 8(a)(1) of the Act.

In her decision, Judge Parke concluded that the Respondent's unfair labor practices contributed to the September 20, 2007 strike and/or thereafter prolonged it. She specifically mentioned the field employees' displeasure at being restricted from the Chevron station, at being told to whom they could talk, at being told their paychecks would be delayed to prevent them from meeting with Batcher, and at being threatened that their work stoppage was tantamount to quitting, all of which constituted unfair labor practices. According to Judge Parke, in deciding to strike, the field employees both considered and were provoked by these specific unfair labor practices on the part of the Respondent. Further, she found that the Respondent had not met its burden to show that the strike would have occurred even if it had not committed unfair labor practices. Therefore, she concluded, with the Board affirming, that the September 20, 2007 strike was an unfair labor practice strike from its inception.

On September 26, 2007, the strikers presented the Respondent with an unconditional offer to return to work signed by each striker. Upon its receipt, John Hohman,[7] the Respondent's vice president, informed the strikers that they had all been "permanently replaced" and directed each to sign a "preferential hiring list." The earliest any striker was recalled to work was in December 2007. Judge Parke concluded, with the Board affirming, that by failing to immediately reinstate the unfair labor practice strikers who had unconditionally offered to return to work on September 26, 2007, the Respondent violated Section 8(a)(3) and (1) of the Act.[8]

On September 7, 2007, Brady Bratcher went to the Respondent's Phoenix facility wearing a union cap, and requested an employment application. He informed the office worker on hand, Maria Perez, that he wanted to work and to organize. Matt Pickens, contacted by telephone, directed Perez to tell Bratcher to leave the office or the police would be called, which she did. She also refused to give Bratcher an employment application.[9] Judge Parke concluded that refusing to give Bratcher an employment application, which was customarily proffered to all other job seekers, solely because of his union affiliation was coercive regardless of whether or not completing the application might lead to his employment. Accordingly, she found, with the Board affirming, that the Respondent's conduct constituted a violation of Section 8(a)(1) of the Act.

The above summary concludes the recitation of background facts and violations of the Act, as found by Judge Parke and affirmed by the Board in its decision.[10] I will now turn to the facts and issues presented to me in the dispute at hand.

B. The Current Dispute

In the matter before me, the complaint, as finally amended, alleges that the Respondent threatened its employees by informing them that it would be futile for them to engage in union or other concerted activities; by telling unfair labor practice strikers seeking reinstatement that they were only at the facility to cause trouble; and by telling those strikers that they would be treated only as economic strikers who would be contacted when there were job openings. It is also alleged that the Respondent orally promulgated and maintained an overly-broad and discriminatory rule prohibiting employees who were working from telling striking employees where the Respondent's crews were working; and orally promulgated and maintained another overly-broad and discriminatory rule prohibiting employees from speaking with union agents.

Further, the complaint alleges that the Respondent interrogated employees about their union or other concerted activities; created an impression among its employees that their union and other concerted activities were under surveillance; and threatened to physically harm employees because they had engaged in union or other concerted activities.

Finally, the complaint alleges that in April or May 2008, employee Leobardo Delgado engaged in an unfair labor practice strike; then made an unconditional offer to return to work on August 1, 2008; after which the Respondent unlawfully failed to reinstate him.

In reality, the current dispute is merely a continuation and "spill over" from the original dispute, which led to the Board's decision mentioned above. Many of the principals remain the same, including Union Organizer Brady Bratcher, Superintendent Matt Pickens,[11] Assistant Superintendent Javier Loya Bando, Foreman Jesus Guerrero, Foreman Juan Quintero, and employee Leobardo Delgado. The actions of these individuals in the matter before me can not be viewed in a vacuum. Those actions must be viewed in light of their involvement in the ear-

[6] Javier Loya Bando was found to be a supervisor and agent of the Respondent within the meaning of Sec. 2(11) and (13) of the Act.

[7] John Hohman was found to be a supervisor and agent of the Respondent within the meaning of Sec. 2(11) and (13) of the Act.

[8] One of the unfair labor practice strikers who was refused immediate reinstatement after making an unconditional offer to return to work was Leobardo Delgado, who is an alleged discriminatee in the case before me.

[9] By possessing actual authority from Pickens, Perez served as the Respondent's agent in giving directions to Bratcher.

[10] It should be noted that a number of the allegations in the earlier complaint were also dismissed.

[11] Throughout the hearing Matt Pickens was also referred to by his nickname as "Mateo."

lier case. For example, Brady Bratcher continues his efforts to organize the Respondent, and Leobardo Delgado remains a supporter of the Union.

1. The strikers seek employment

As noted above, the strike that began on September 20, 2007, was found by the Board to be an unfair labor practice strike. Further, the Board held that the strikers made an unconditional offer to return to work on September 26, 2007, and the Respondent violated the Act by failing to reinstate them, and by requiring them to sign a document entitled "preferred hire list." However, as found by Judge Park and affirmed by the Board in its decision, the Respondent on December 11, 2007, began laying off the strike replacements it had hired and replacing them with the unfair labor practice strikers. Also, the judge, with the Board adopting, accepted the Respondent's unrebutted evidence that it had experienced a decrease in work in the latter half of 2007, which declining work load precluded replacement of all the striking employees. *Post Tension of Nevada, Inc.,* supra at fn. 18.

As of March 6, 2008,[12] a number of the strikers had still not been replaced. They remained on strike, regularly gathering together with Brady Bratcher to picket at the various jobsites where the Respondent's crews were working. On that date, the strikers were picketing at a jobsite where the foreman of the Respondent's crew was Juan Qintero. Striker Alfonso Ance Salazar testified that while at the jobsite, Qintero told him that it "looked like the Company was hiring personnel," and that he should go to the office the following day and ask for work. Further, Qintero allegedly said that Salazar should ask to be placed on Qintero's crew.

On the morning of the following day, March 7, a number of strikers, accompanied by Bratcher, appeared at the Respondent's office with the apparent intention of applying for work. Bratcher informed Matt Pickens that the striking employees were at the office to seek employment, as Foreman Qintero had said the day before that the Respondent would be hiring. In response, Qintero denied that he had said anything of the kind.

It is important to note that during these conversations Matt Pickens was speaking in English, while the striking employees speak mostly Spanish. Bratcher, who is bilingual, was translating, along with Foreman Javier Loya Bando Jr., who is the son of the Respondent's assistant superintendent.

Salazar testified that Pickens told the strikers to leave the office, that there was no work, and if at any point work was available, he would "call [the strikers] personally from the list . . . in order on the work list." Salazar testified that he understood what Pickens was saying because Bratcher translated Pickens' words into Spanish after they left the office. Counsel for the Respondent then objected to Salazar's testimony as hearsay. I sustained the objection, as the testimony of Salazar was being proffered for the truth of the matter asserted. Since Pickens' English words were allegedly understood by Bratcher, who translated them into Spanish for the benefit of the strikers, only Bratcher could testify as to what Pickens had said, and not have the testimony constitute hearsay.

[12] Hereafter all dates are in 2008, unless otherwise indicated.

Striker Damian Garcia was also at the office seeking work. He testified that after Foreman Qintero denied telling anyone that there was work available, Matt Pickens said that he "would be calling [the strikers] as work became available . . . would be calling [the strikers] as per the order on the waiting list." Garcia indicated that Javier Loya Bando Jr. was doing the translating of Pickens' statements from English into Spanish. There was no hearsay objection to Garcia's testimony, although clearly it was being offered for the truth of the matter asserted. As there must be an affirmative objection to hearsay testimony in order to exclude it, and since there was no such objection, I will accept this testimony from Garcia as being offered and admitted for the truth of the matter asserted.

Striker Leobardo Delgado was another employee present to seek work. He testified that Qintero denied telling any of the strikers that there was available work. According to Delgado, Pickens then told Bratcher that "he was only there to cause problems, that he was just there as a stupid . . . like a stupid person." Delgado indicated that somebody was translating into Spanish, maybe "Javier Loya," but he wasn't sure just who. In any event, there was no hearsay objection. Accordingly, I will accept this testimony from Delgado as being offered and admitted for the truth of the matter asserted.

Brady Bratcher also testified about the events at the Respondent's office. According to Bratcher, Quintero denied telling any of the strikers that work was available. At that point, Matt Pickens allegedly said that "when he hires, he's going to hire off the preferential hiring list." Further, Bratcher claims that after he pressed Pickens about the list, Pickens replied, "Brady, you're not an idiot, but you're acting like one right now." Pickens then continued, telling Brady, "You guys have had your day in court. . . . Why do you come down here like this . . . . You guys are wanting to cause trouble." According to Bratcher, after he left the office, he told the assembled strikers what Pickens had said.[13]

At the time of this hearing, Matt Pickens was no longer employed by the Respondent. He did not testify at this proceeding. Javier Loya Jr. testified that Pickens asked him to translate. He recalled Pickens saying, "They weren't hiring yet, but, as soon as they hired, they would get them off the list, from their list."

There is no dispute that as of March 7, there remained unfair labor practice strikers who had not yet been reinstated. However, the judge in the earlier case determined that the Respondent's declining work load precluded replacement of all the striking employees at that time. No evidence was offered by counsel for the General Counsel to establish that the Respondent's work load had increased, or that the Respondent had not immediately reinstated the remaining strikers upon having available positions. To the contrary, the Respondent's vice president, John Hohman, testified that as of the date of the hearing all the striking employees who went on strike on September 20, 2007, had been offered reinstatement. This testimony remained unrebutted.

[13] I assume by the "day in court" reference, what is meant is the earlier unfair labor practice hearing before Judge Parke.

The General Counsel alleges in paragraph 5(a)(2) that on March 7, the Respondent violated Section 8(a)(1) of the Act when Matt Pickens threatened striking employees seeking reinstatement that they would be treated only as economic strikers and that the Respondent would contact them when the Respondent had job openings. Counsel for the General Counsel argues correctly that an employer may not describe to strikers a consequence of a strike that is inconsistent with their rights. *Kingsbridge Heights Rehabilitation Care Center,* 353 NLRB 826 (2008); *Grinnell Fire Protection Systems,* 328 NLRB 585 (1999). However, I do not believe that this is what the evidence shows in the matter before me.

There is no credible evidence that the Respondent had job openings or that it was hiring when a number of the strikers arrived at its office the morning of March 7. Striker Salazar testified that Foreman Juan Quintero told him the day before merely that it "looked like" the Respondent was hiring and that he should go to the office and ask for work. When confronted by Salazar and other strikers the following day, Qintero denied making any such statement. In any event, Pickens denied that there was any hiring going on. As counsel for the General Counsel has offered no evidence to the contrary, I will assume that Pickens' statement was accurate when given.

Damien Garcia credibly testified that Pickens told the strikers that he would be calling them as work became available in their "order on the waiting list." Garcia's testimony was uncontested, and I accept it as accurate. However, I do not believe that Pickens' statement was either misleading or unlawful. By that date, the strike replacements had all been terminated. Some of the strikers had been reinstated, with the others not being recalled simply because the Respondent's reduced work load precluded their immediate reinstatement. The strikers had originally signed a "preferred hire list" on September 26, 2007, offering to unconditionally return to work. As noted, the Board has determined in the earlier case that requiring the strikers to sign such a list was unlawful since they were unfair labor practice strikers who were entitled to immediate reinstatement.

As of March 7, it appears that the Respondent had done what the law required it to do, namely to terminate the strike replacements and to reinstate those unfair labor practice strikers who could be reinstated, consistent with the Respondent's reduced need for labor because of its declining work load. That was essentially what Pickens was telling the strikers when he said that he would call them as work became available in their "order on the waiting list." Of course, the Act does not require that the Respondent offer strikers jobs that do not exist because of economic conditions. Also, I see nothing unlawful about Pickens using a "waiting list" with the remaining strikers' names on it so as to call them back to work in the order in which they signed the list, once the economic conditions warrant it. I assume the "waiting list" is actually the original "preferred hire list" the strikers signed on September 26, 2007. However, the name of the list is of no importance. What Pickens was saying, and what the strikers should have understood, was that as soon as jobs were available he would be calling them back to work in the order that they had previously listed their names.

I am of the view that in his conversation with strikers on March 7, Pickens did not mislead, misinform, or untruthfully describe the consequences of their situation as unfair labor practice strikers when he spoke to them about their request to return to work. As his statements did not violate the Act, I shall recommend that complaint paragraph 5(a)(2) be dismissed.

In complaint paragraph 5(a)(1), the General Counsel alleges that on March 7, Matt Pickens threatened employees by informing them that it would be futile for them to engage in union or other concerted activities, and by telling unfair labor practice strikers seeking reinstatement that they were only at the Respondent's facility to cause problems or trouble. It appears from counsel for the General Counsel's posthearing brief that he is relying on the alleged statements made by Matt Pickens on the morning of March 7, to establish that the employees were being informed that their attempts to exercise their Section 7 rights as unfair labor practice strikers, to be reinstated, were being pursued in vain. However, as I noted above, I found nothing Pickens said to strikers that morning that would reasonably mislead, misinform, or untruthfully describe the consequences of their situation as unfair labor practice strikers. Based on what had transpired to that date, they should have understood that when work was available they would be recalled to their former jobs by Pickens, in the order in which they had signed the "waiting list." Pickens told them that at the moment the Respondent was not hiring, as there was no work available.

The unfair labor practice strikers in Pickens' office on March 7, had already seen some of their fellow strikers reinstated and had seen the strike replacements terminated. These events did not happen in a vacuum, and the remaining strikers should reasonably have had some idea of the way the process was working. In any event, in my opinion Pickens said nothing that should have reasonably led the unfair labor practice strikers who were in the Respondent's office seeking reinstatement to view their exercise of protected activity as futile.

The continuation of the General Counsel's argument is the contention that Pickens told the strikers that they were only at the Respondent's office to cause problems or trouble. However, the testimony from the witnesses called by counsel for the General Counsel was at best inconsistent and at worst contradictory. Strikers Alfonso Ance Salazar and Damian Garcia testified about Pickens' statements on the morning of March 7, and yet did not mention anything about the alleged statement concerning causing trouble or problems.

Striker Leobardo Delgado was also present during the conversation in question. While he wasn't certain about who was doing the translating, he recalled being told that Pickens in addressing Brady Bratcher had said that Bratcher was "like a stupid person." Bratcher testified that Pickens told him that while Bratcher was not an "idiot," he was "acting like one." However, of the four witnesses called by counsel for the General Counsel who testified about the events of that day, Bratcher was the only one to indicate that Pickens added to his statement the comment, "You guys are wanting [sic] to cause trouble."

It is obvious from a view of the previous case, as well as the one at hand, that Bratcher and Pickens were not on good terms.

I am certainly not surprised that Pickens would tell Bratcher that he was "stupid," or that Bratcher was causing "trouble or problems." However, I do think it unlikely that Pickens would have directed that remark to the assembled strikers. The fact that none of the strikers testified that such a remark was directed at them is especially significant, as I am convinced that had Pickens directed such a statement at the strikers that Bratcher would have quickly interpreted the remark for the strikers' benefit.

Bratcher is actively engaged in a hotly contested campaign to organize the Respondent. His interest in wanting to have the strikers view Pickens in the worse possible light is obvious. As the strikers who testified recalled no such statement being made by Pickens and directed at them, I am of the view that Bratcher has exaggerated and embellished the remarks make by Pickens. I believe that the credible evidence shows that it is more likely than not that Pickens accused Bratcher of causing trouble or problems, and that the comment was not directed at the strikers. Since Bratcher was not an employee of the Respondent, was not a job applicant at the time, and any comment about problems or trouble was directed at him individually and not at the employee/strikers, I conclude that there was nothing coercive about the language used.

I find that any statements made by Matt Pickens on March 7, did not threaten striking employees, advise them that their concerted activities were futile, or that they were causing trouble or problems. Accordingly, I shall recommend that complaint paragraph 5(a)(1) be dismissed.

The General Counsel alleges in complaint paragraph 5(b) that in March 2008, Foreman Juan Quintero orally promulgated and since then has maintained an overly-broad and discriminatory rule prohibiting employees from telling striking employees where the Respondent's crews were working. This is alleged to constitute a violation of Section 8(a)(1) of the Act. The employee to whom this alleged discriminatory rule was directed was Leobardo Delgado.

According to Delgado's testimony, about 3 days after the March 7 incident where the strikers confronted Matt Pickens about returning to work, he was engaged in a conversation with Juan Quintero at the Chevron station. Quintero allegedly mentioned to Delgado that there might be a job available on his crew, since one of the employees might be leaving to go to Mexico. Quintero said that Delgado would be receiving a call from one of the Respondent's foremen if the job became available. Delgado testified that Quintero then instructed him "not to go around telling Brady Bratcher where the crews [are] to be working, so that they wouldn't be picketing them." Subsequently, Delgado received a phone call from Javier Loya Bando Sr., who offered him a job. Delgado accepted and returned to work with the Respondent on about March 20, 2008.

Juan Quintero testified that during the period that Leobardo Delgado was on strike, he never directed Delgado not to tell Brady Bratcher where employees were working. However, I credit Delgado's testimony over that of Quintero. While neither man seemed to have a good recall of the events in question, Delgado's testimony regarding the remark about Bratcher seemed to be in context with the rest of the events that surrounded the strike and the effort to return the strikers to their jobs. As to this particular remark alleged made by Quintero, Delgado's testimony did have the ring of authenticity to it.

Certainly, a rule prohibiting contact with a union organizer, such as Bratcher, is unlawful as it is intended to interfere with the Section 7 rights of employees. *Airport 2000 Concessions, LLC,* 346 NLRB 958, 959 (2006). Even absent evidence of enforcement, the mere maintenance of a rule that would likely have a chilling effect on Section 7 rights is unlawful. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). In fact, such a rule is unlawful on its face. *The Loft,* 277 NLRB 1444, 1461 (1986); *Automatic Screw Products Co.,* 306 NLRB 1072 (1992).

Quintero instructed Delgado not to tell Brady Bratcher where the employees were working so as to avoid having the union pickets appear on the jobsites. As the strikers and others had the Section 7 right to engage in this sort of union activity, and as Delgado, as a working employee, also had the Section 7 right to support their picketing activity and to communicate his support to them, Quintero's efforts to prevent this activity were unlawful. By orally promulgating and maintaining an overly-broad and discriminatory rule that prohibited employees who were working from talking with a union organizer or from telling striking employees where the Respondent's crews were working, Quintero was in violation of the Act.

Accordingly, I conclude that the Respondent has violated Section 8(a)(1) of the Act, as alleged in paragraphs 5(b) and 7 of the complaint.

2. Confrontation between Delgado and Guerrero

In complaint paragraph 5(c)(1)–(4), the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activity, by orally promulgating and maintaining an overly-broad and discriminatory rule prohibiting employees from speaking with union agents, by creating an impression among its employees that their union activities were under surveillance, and by threatening to physically harm employees because they engaged in union activity. All these allegations relate directly to a confrontation on April 2, 2008, between Leobardo Delgado and his foreman, Jesus Guerrero.

As noted earlier, Leobardo Delgado, an unfair labor practice striker, received a call from the Respondent to return to work, which he did on approximately March 20, 2008. (GC Exh. 3.) Delgado testified that he proceeded to work on the crews of a number of foremen and at different jobsites, when in early April he found himself working at the Rachel Ridge jobsite for foreman Jesus Guerrero. While on that jobsite, the two men got into an altercation over a "key" used to remove saw blades. These saws are used to cut the tension cables that the crews lay in concrete. Delgado had apparently used the key the day before, and Guerrero asked him to retrieve it. However, Delgado informed Guerrero that he had placed the key in the tool box, which the key then fell to the bottom of the box and "got lost."

Upon learning that the key was lost and that the saw blade could not be replaced, Guerrero apparently became incensed. According to Delgado, Guerrero tried to hit him with a can of spray paint. Delgado avoided being hit by the spray can, but Guerrero did manage to spray some paint on his shirt. At about

this time the key was located and Guerrero calmed down. Delgado took this opportunity to call Brady Bratcher on his cell phone. Delgado testified that he spoke to Bratcher at about 10:30 for about 5 minutes. He told Bratcher what had just occurred on the jobsite. Apparently at that point, Guerrero noticed that Delgado was on the phone and asked, "Who the fuck [he] was talking to." Delgado responded that he was talking with Bratcher. He testified that Guerrero then said he should "not be talking to that fucking old man from the Union."

Guerrero called the Respondent's office, apparently to report what had transpired. Approximately 30 minutes later Matt Pickens arrived at the jobsite. Pickens separately interviewed both Delgado and Guerrero as to what had happened, and as he did not speak Spanish, he used the Respondent's secretary, Elizabeth Palacios, who over the telephone acted as a translator. Through Palacios, Pickens told both Delgado and Guerrero that the Respondent's assistant superintendent, Javier Loya Bando Sr., would meet with the two men the following morning to sort things out.

However, according to Delgado, after Pickens left the jobsite, Guerrero approached Delgado and said that, "If they fired him [over the incident] it would be [Delgado's] fault, and he would come to [Delgado's] house, seek [Delgado] out at [his] house and kill [Delgado]." The following day, Delgado arrived at the Respondent's office early, expecting to deal with the events of the previous day. However, Guerrero was not present and Bando told him to go to work, and the matter would be resolved later.

Neither Matt Pickens nor Jesus Guerrero was employed by the Respondent at the time of the hearing, and neither man testified. Elizabeth Palacios did testify, and indicated what both Guerrero and Delgado had told Pickens at the jobsite the day of the altercation. For the most part, she corroborated Delgado's testimony about what he told Pickens had occurred on the jobsite. She did add that about 5 minutes after she finished translating the respective versions of the events from Guerrero and Delgado for Pickens, she received a call from Guerrero, who wanted to know what Delgado had told Pickens. According to Palacios, Guerrero also complained that whenever he tells Delgado something, Delgado repeats it to Brady Bratcher, and that Delgado tells Bratcher "everything that [is] going on." She testified that she told Guerrero that if he thought that Delgado was calling Bratcher, that he should let Matt Pickens know at the meeting that the men were supposed to have the following morning. About 3 to 4 weeks after the incident at Rachel Ridge, Palacios wrote an account of her conversations with Delgado and Guerrero. (R. Exh. 3.)

As counsel for the General Counsel points out in his posthearing brief, an employer's threat or attempt to physically harm an employee as a result of that employee's union activity is an unfair labor practice. Such a threat or attempt to harm would reasonably tend to interfere with the employee's free exercise of Section 7 rights. Counsel cites a number of cases that stand for that proposition. However, the problem with counsel's argument is that in the case at hand, the evidence does not show that any threats or attempts to harm made by Guerrero and directed towards Delgado were in any way based on animosity towards Delgado because of his union activity. Assuming Delgado's version of events was accurate, there is nothing to establish that the argument between Delgado and Guerrero, Guerrero's attempt to hit Delgado with a can of spray paint, or Guerrero's subsequent death threat were in anyway in response to Delgado's union activity. The cases cited by counsel for the General Counsel are all distinguishable based on the facts before me.

The altercation between Guerrero and Delgado was the result of a lost key for a saw blade. As the saw was used to cut cable, obviously essential for the performance of the Respondent's job of fabricating and installing stress cables in the concrete slabs supporting homes under construction, an inoperable saw would surely stop the crew from performing its work until the old blade could be replaced. All the evidence points to this reason for Guerrero becoming so upset with Delgado, who was the last person having possession of the key. Time is always a very important factor in the construction industry, and the potential delay caused by the lost key would likely have upset Guerrero considerably. Of course, Guerrero acted in an immature fashion in attempting to hit Delgado with the spray paint can and by spraying Delgado's shirt with paint. Nevertheless, there is no probative evidence to show that there was any other reason for Guerrero's tirade, including hostility to Delgado's union activity.

Similarly, there is no probative evidence to establish that Guerrero threatened to kill Delgado because he allegedly disliked Delgado's union activity. Clearly Guerrero was upset with Delgado for losing the key. However, Guerrero became even more incensed when he learned that Delgado had given Matt Pickens his own version of the altercation at Rachel Ridge. Guerrero was obviously upset about the turn of events that had occurred, and was worried that he might be fired for something that he did or said. It was in that atmosphere that he confronted Delgado and told him that if he (Guerrero) were fired, he would go to Delgado's home and kill him. Once again, what appeared to upset Guerrero was the incident with the key and his concern that he might be terminated because of what Delgado had told Pickens. There was no probative evidence to show that animosity towards Delgado's union activity caused Guerrero to make a threat to kill Delgado.

I do not believe that Guerrero's attempt to hit Delgado with a spray can or threat to kill him constituted a violation of the Act. Obviously, these were improper and potentially criminal acts. However, they were simply not unfair labor practices. Therefore, I shall recommend that complaint paragraph 5(c)(4) be dismissed.

The General Counsel has alleged that Guerrero's conduct at the Rachel Ridge project also created an unlawful impression of surveillance. As noted, after Guerrero tried to hit him with the spray paint can, Delgado called Brady Bratcher. Seeing him on the phone, Guerrero asked him "who the fuck [he was] talking to." Upon learning that it was Bratcher, Guerrero responded that Delgado should not be talking with that "fucking old man from the Union." From that language, it certainly did appear that Guerrero was interested in making sure Delgado did not communicate with union officials. My conclusion is reinforced by the telephone conversation that Guerrero had with Elizabeth Palacios that same day when he told her that Delgado was tell-

ing Brady Bratcher everything that he heard or learned was going on.

As counsel for the General Counsel points out, the test for whether an employer creates an unlawful impression of surveillance is whether, under the circumstances, an employee could reasonably conclude that his union activities are being monitored. *Mountaineer Steel, Inc.,* 326 NLRB 787 (1998), enfd. 8 Fed. Appx. 180 (4th Cir. 2001). Delgado certainly had reason to believe that his conversations with the Union were being observed. As noted above, before being rehired, he had been warned by Foreman Juan Quintero not to tell Bratcher or the strikers where the crews were working. He was now being questioned and chastised by Foreman Guerrero not to talk with Bratcher. Based on what the two foremen said to him, Delgado had good reason to worry about the Respondent becoming upset with him when he was observed talking with Bratcher. The Board has held that under the Act "[e]mployees should not have to fear that 'members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.'" *Conley Trucking,* 349 NLRB 308 (2007), quoting *Fred'k Wallace & Son, Inc.,* 331 NLRB 914 (2000).

I conclude that Guerrero was engaged in creating an unlawful impression of surveillance when he asked Delgado who he was talking with on the Rachel Ridge project. Because of the previous warring that he had received from Quintero, and the language used by Guerrero when he learned that Delgado was talking with Bratcher, Delgado had good reason to believe that his union activity was under surveillance. Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act, as alleged in paragraphs 5(c)(3) and 7 of the complaint.

Also, when Guerrero, having heard that Delgado was talking with Bratcher, told Delgado not to talk to the "fucking old man from the union," he was essentially orally promulgating and maintaining an overly-broad and discriminatory rule prohibiting employees from speaking to union agents. His actions were similar to and a continuation of Juan Quintero's admonition to Delgado before he was rehired not to tell Bratcher or the strikers where the crews were working. Obviously, such conduct restrains, coerces, and interferes with employees' ability to exercise their Section 7 rights. *Airport 2000 Concessions, LLC,* supra. Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act, as alleged in paragraphs 5(c)(2) and 7 of the complaint.

The General Counsel alleges that the same set of circumstances also produced an unlawful interrogation of Delgado by Guerrero, specifically the language, "Who the fuck [are you] talking to?" However, whether this question on its face constituted unlawful interrogation of protected activity is not clear cut.

In determining whether a supervisor's questions to an employee about his union activities were coercive under the Act, the Board looks to the "totality of the circumstances." *Rossmore House,* 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). In *Westwood Health Care Center,* 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "*Bourne* factors," so named because they were first set forth in *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964). These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

Of course, Guerrero was Delgado's foreman, and, as noted earlier, a statutory supervisor. The question occurred on the jobsite, just after the two men had been involved in a very heated altercation. The question merely asked, although in a profane way, with whom Delgado was talking. Delgado likely could have named anyone, but truthfully indicated Brady Bratcher. As noted above, I have already found the question to constitute a violation of the Act as creating the impression of surveillance and, with Guerrero's subsequent statement, creating an unlawful rule prohibiting Delgado from speaking with Bratcher. Still, I do not believe the question constituted unlawful interrogation.

The question occurred on the jobsite while Delgado was expected to be working. Guerrero as the Respondent's foreman surely had a legitimate interest in ensuring that Delgado was performing his work during working time. Of course, the atmosphere was still highly charged, following the attempt by Guerrero to hit Delgado with the spray can. But, I have found that Guerrero's attempt to hit Delgado was unrelated to his union activities.

In any event, in my view, the most significant factor in finding that the question did not constitute unlawful interrogation was the lack of any attempt on the part of Guerrero to follow up the question. Delgado answered the question, admitting that he was talking with Bratcher. Guerrero's response was to order him not to talk with that "fucking old man from the union," which comment I have already determined was unlawful. However, that ended the conversation. Guerrero did not try and follow his question up with any additional inquires, such as, "What did you tell him?" or "What did he say?" Had he done so, I would have concluded that an unlawful interrogation had occurred. He only asked the single question. In the absence of such further inquires, I must find that under the "totality of the circumstances," no unlawful interrogation had occurred. Accordingly, I shall recommend that complaint paragraph 5(c)(1) be dismissed.

3. Delgado goes on strike

On April 10, 2008, about a week after the altercation between Delgado and Guerrero, Delgado went on strike for the second time. The General Counsel alleges in complaint paragraph 6(b) that this was an unfair labor practice strike, and alleges in paragraphs 6(c)–(d) and 8 that the Respondent's refusal to reinstate Delgado after he made an unconditional offer to return to work constituted a violation of Section 8(a)(1) and (3) of the Act.[14]

As noted above, Delgado originally went out on strike with other laborers on September 20, 2007. The Board in the earlier case found Delgado and the other strikers to be unfair labor

[14] These complaint paragraphs were added as an amendment by counsel for the General Counsel during the hearing. (GC Exh. 2.)

practice strikers. Delgado and the other strikers made an unconditional offer to return to work on September 26, 2007, and Delgado was reinstated on about March 20, 2008. He remained on the job for approximately 20 days, when he went back on strike on April 10, 2008.

According to Delgado, he was sick for the week prior to April 10, but continued to work every day. On approximately that date, he was loading tools onto a truck at the Respondent's facility when he was approached by the Respondent's assistant superintendent, Javier Loya Bando Sr. Delgado testified that Bando told him that one of the foremen had said that Delgado "wasn't worth a fuck to work with," and that Delgado "wasn't turning out the work at the same rate as the other people." Delgado told Bando that he was turning out the work at the same rate as the other laborers.[15] Then Delgado told Bando that he was going home "to get a sheet [of] paper." He testified that he further said, "I was going to go back on strike because I couldn't stand being told that I wasn't worth a fuck to work with." Delgado was then prompted by counsel for the General Counsel, who asked him if there were any other reasons he gave Bando for going on strike. In response, Delgado added, "Because Jesus Guerrero had threatened my life and also because Juan Quintero had also told me not to run around telling Brady Bratcher where we were going to be working, where the crews were going to be working."

Delgado returned home and retrieved a document that Brady Bratcher had previously prepared. He handed the document to Bando. It read as follows: "I LEOBARDO DELGADO HEREBY NOTIFY POST TENSION OF NEVADA INC. THAT I AM ON AN UNFAIR LABOR PRACTICE STRIKE UNTIL FURTHER NOTICE." (GC Exh. 4.) According to Delgado, Bando received the document, but seemed not to really be paying attention.

From April 10 through the end of July 2008, Delgado remained on strike. During that time he went with Bratcher and other strikers to the Respondent's jobsites where he participated in picketing and strike activity. However, he testified that, thereafter, he decided that he "want[ed] to work," and so he asked Bratcher to draft a document for him offering to return to work unconditionally. On August 1, 2008, Delgado and Bratcher arrived at the Respondent's facility and handed the document to Ken Saffin, the Respondent's manager.[16] The document reads as follows: "I LEOBARDO DELGADO HEREBY OFFER TO END MY UNFAIR LABOR PRACTICE STRIKE WITH POST TENSION OF NEVADA INC. UNCONDITIONALLY AND RETURN TO WORK IMMEDIATELY."

According to Delgado, Saffin accepted the document and told Delgado to sign a "sheet of paper," from which he would be "called up for work when a job—a work opportunity appeared." The "sheet of paper" that Delgado signed on August 1, 2008, at Saffin's request was headed "preferential hire list." Delgado's name was the only one on the list. (GC Exh. 7.) On August 5, 2008, the Respondent sent Delgado a letter offering to "put you back to work in your position immediately." (GC Exh. 5.) However, as of the first day of the hearing, which was August 6, 2008, Delgado had not yet received the letter.

It is the General Counsel's position that Delgado's decision to go on strike on April 10, 2008, was based in part on certain unfair labor practices committed by the Respondent, which are alleged in the complaint. Therefore, the General Counsel contends that Delgado was engaged in an unfair labor practice strike and the Respondent was obligated to immediately reinstate him upon his making an unconditional offer to return to work as of August 1, 2008. Counsel for the General Counsel argues that by failing to offer Delgado reinstatement for a period of approximately 5 days, the Respondent has violated the Act.

On the other hand, the Respondent takes the position that Delgado's decision to strike was unrelated to any alleged unfair labor practices committed by the Respondent. Therefore, it is argued that as an "economic striker," Delgado is only entitled to reinstatement upon making an unconditional offer to return to work, when a position becomes available. Further, the Respondent emphasizes that in the earlier decision, the Board adopted Judge Parke's finding that the Respondent's declining work load precluded immediate replacement of all striking employees. According to the unrebutted testimony of the Respondent's vice president, John Hohman, on the date that Delgado went on strike for the second time, there were still unfair labor practice strikers from the original strike that had not yet been reinstated because of the Respondent's decreased work load. However, he testified that as of the second day of this hearing, August 7, 2008, all of the remaining unfair labor practice strikers from the September 20, 2007 strike had been offered reinstatement.

It is well established Board law that a work stoppage is considered an unfair labor practice strike "if it is motivated, at least in part, by the employer's unfair labor practices, even if the economic reasons for the strike were more important than the unfair labor practice activity." However, it is not sufficient to merely show that the unfair labor practices preceded the strike. There must be a "causal connection" between the unfair labor practices and the strike. *Golden Stevedoring Co.,* 335 NLRB 410, 411 (2001).

In his posthearing brief, counsel for the Respondent relies heavily on the Board's holding in *C-Line Express,* 292 NLRB 638, 639 (1989), where the Board looked to the strikers' state of mind and found a lack of evidence that the strikers were motivated to prolong the strike by coercive employer statements on the picket line. Still, when it is reasonable to infer from the record that an employer's unlawful conduct played a part in the decision of employees to strike, the strike is considered an unfair labor practice strike. *Child Development Council of Northeastern Pennsylvania,* 316 NLRB 1145 fn. 5 (1995), citing *NLRB v. Cast Optics Corp.,* 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 419 U.S. 850 (1972) (as long as an unfair labor practice has "anything to do with" causing the strike, it will be considered an unfair labor practice strike). In any event, the burden remains on an employer to show that the strike

[15] While there was much testimony from various witnesses at the hearing as to whether or not Delgado was a productive employee, I need not make any such determination, as Delgado was never disciplined or discharged for poor work performance.

[16] Saffin is an admitted supervisor and agent of the Respondent.

would have occurred even if the employer had not committed unfair labor practices. *Larand Leisurelies, Inc., v. NLRB,* 523 F.2d 814, 820 (6th Cir. 1975).

As I view the evidence in the case at hand in conjunction with the Board's decision in the earlier case, I am of the opinion that Leobardo Delgado and Brady Bratcher are trying to play "gotcha" with the Respondent. Delgado was one of a number of strikers found by the Board in the earlier case to be an unfair labor practice striker. He originally went out on strike with his fellow employees on September 20, 2007; made an unconditional offer to return to work 6 days later on September 26, 2007; was returned to work by the Respondent on March 20, 2008; remained on the job for only 20 days, when he again went out on strike on April 10; and unconditionally offered to return to work again as of August 1, 2008.

Brady Bratcher, who has been actively trying to organize the Respondent's business, appears to have been directly involved in the decisions that Delgado has been making regarding working and striking. As noted earlier, he prepared both Delgado's letter of April 10, announcing that he was going on an "unfair labor practice strike," as well as his letter of August 1, making an unconditional offer to return to work. Delgado speaks Spanish, with apparently a very limited understanding of English. Clearly the technical words used in these letters, such as "unfair labor practice strike" (GC Exh. 4.) and return to work "unconditionally" (GC Exh. 6) were "terms of art" in labor relations that I would certainly expect Bratcher to know, not Delgado. Frankly, I am highly dubious of Delgado's motives in striking the Respondent. I suspect that his decision to go on strike on April 10, 2008, was more of an organizing tactic than anything else.

The General Counsel argues that the Respondent's unfair labor practices "played a part" in Delgado's decision to go on strike. This I doubt. Initially, when asked on direct examination by counsel for the General Counsel how he responded to Assistant Superintendent Bando's accusation that one of the foremen had said he "wasn't worth a fuck to work with," Delgado testified that he told Bando that, "I was going to go back on strike because I couldn't stand being told that I wasn't worth a fuck to work with." It was not until counsel for the General Counsel prompted Delgado by asking him, "Were there any other reasons you told Javier [Bando] why you were going on strike?" that Delgado replied, "Yes." He then listed as if by rote the unfair labor practices alleged in the complaint, namely, "also because Jesus Guerrero had threatened my life and also because Juan Quintero had also told me not to run around telling Brady Bratcher where we were going to be working—where the crews were going to be working."

In prompting Delgado in this way, counsel for the General Counsel was in essence "leading the witness." While there was no objection from Respondent's counsel and so this leading testimony was admitted, I find Delgado's response highly unreliable. It appeared to me that Delgado was content to testify that he told Bando that he was going to strike because he did not appreciate the comment about not being "worth a fuck to work with," until he was reminded through counsel's leading question that there was more that he was expected to add to the reasons that he had given Bando for going out on strike. The additional answer, of course, involved the Respondent's alleged unfair labor practices.

In general I did not find Delgado to be a particularly reliable witness. His testimony was often disjointed and confusing. He would frequently say something one way, and then another way after being questioned by counsel. He seemed particularly receptive to suggestions from counsel, whether on direct or cross-examination. As I indicated, this especially manifested itself when counsel for the General Counsel prompted him about his conversation with Bando. Therefore, I suspect that when he told Bando that he was going out on strike, the only reason offered by Delgado was his offense with being told that he "wasn't worth a fuck to work with."

The circumstances surrounding Delgado's strike on April 10, further undermine the General Counsel's theory. I have, of course, found that the Respondent did commit a number of unfair labor practices. However, these unfair labor practices did not appear to have particularly upset Delgado at the times they occurred.

On about March 10, 2008, Foreman Juan Quintero cautioned Delgado, who was still on strike at the time, that if he were rehired "not to go around telling Brady Bratcher where the crews [are] working, so that they wouldn't be picketing them." I have found this statement to constitute an unfair labor practice. However, Delgado was apparently not particularly concerned or upset about the warning, as he subsequently accepted an offer to return to work, and did in fact return about March 20.

On April 2, 2008, Delgado had the altercation with Jesus Guerrero. While I have found that Guerrero's attempt to hit Delgado with a can of spray paint and subsequent threat to come to his home and kill him were not unfair labor practices as unrelated to Delgado's union activity, Delgado testified that he was very upset by these events. During the same confrontation, Guerrero questioned Delgado about whom he was talking with on the phone, which question I have concluded created an unlawful impression of surveillance, and upon learning that Delgado was talking with Bratcher, directed Delgado "not to be talking to that fucking old man from the Union." Both by creating an impression of surveillance and by directing Delgado not to talk with a union agent, the Respondent had committed unfair labor practices. Yet, while Delgado testified that all these events greatly upset him, he continued working for the Respondent for another 8 days, until April 10. He allegedly spoke with Brady Bratcher about his unhappiness working for the Respondent, as Bratcher prepared a strike notice for Delgado's use. Still, he did not present the notice to the Respondent for over a week after the incidents occurred.

Looking to Delgado's "state of mind," I do not believe that there was a "causal connection" between the unfair labor practices committed by the Respondent and Delgado's decision to strike on April 10. *C-Line Express,* supra. Until prompted by counsel for the General Counsel's follow-up question, Delgado testified that he told Bando that, "I was going to go back on strike because I couldn't stand being told I wasn't worth a fuck to work with." In my view, that was really the sole reason why Delgado decided to go back on strike. I do not credit the additional reasons that he added after counsel's prompt. Certainly,

based on the sequence of events, it appears that the only reason for his strike action was Bando's comment about Delgado not being "worth a fuck to work with." The actual unfair labor practices committed by the Respondent's foremen had all occurred at least a week prior to Delgado's presentation of the strike notice to Bando. He was apparently unperturbed by these unfair labor practices, as he took no affirmative action until he felt insulted by Bando's comment. Then he acted immediately. It seems that comment, and nothing else, caused Delgado to strike. As such, the strike that Delgado engaged in on April 10, 2008, does not constitute an unfair labor practice strike.

While the strike notice signed by Delgado and presented to Bando on April 10, specifically calls the action an "UNFAIR LABOR PRACTICE STRIKE," that language is certainly not controlling. The notice was drafted by Brady Bratcher, who I believe was attempting to create a situation that adversely affected the Respondent to the greatest extent possible. After all, Bratcher was engaged in a long-running effort to organize the Respondent. Any pressure that he could bring to bear against the Respondent would certainly be to the Union's benefit. Bratcher had been involved in Delgado's and the other employees' original decision to strike and subsequently request reinstatement. He was again involved in Delgado's second decision to strike and subsequently request reinstatement. I believe that to a certain extent Bratcher was attempting to "game" the system. In any event, while the original strike was an unfair labor practice strike, I do not believe that Delgado's second strike was in the same category.

From the credible record evidence, I conclude that the Respondent's unlawful conduct did not reasonably pay a part in Delgado's decision to strike on April 10, 2008. *Child Development Council of Northeastern Pennsylvania,* supra. Therefore, I conclude that the strike engaged in by Delgado on April 10, was not an unfair labor practice strike.

Concomitantly, as an "economic striker," the Respondent was under no obligation to immediately reinstate Delgado to his former or substantially equivalent position of employment upon his unconditional offer to return to work, with the requirement that any strike replacement for him be discharged. Nor was there anything improper about requiring Delgado to sign a "preferential hire list" on August 1, 2008, when he offered to return to work unconditionally. (GC Exh. 7.)

In any event, it should be noted that Delgado was offered reinstatement on August 5, 2008, 4 days after he submitted the letter on August 1, offering to return to work unconditionally. (GC Exhs. 5 & 6.) Further, no evidence was offered to establish that any position was available for Delgado earlier than August 5, or that a strike replacement had been hired to replace him, or that the Respondent's economic situation had improved since the Board in the earlier case adopted the judge's finding that the Respondent had experienced a decrease in work.

Accordingly, I shall recommend that complaint paragraphs 6(b), (d), and 8 be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Post Tension of Nevada, Inc., Phoenix, Arizona, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, District Council of Iron Workers of the State of California and Vicinity, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) Orally promulgating and maintaining an overly-broad and discriminatory rule that prohibited employees who were working from telling striking employees where crews of the Respondent's employees were working.

(b) Orally promulgating and maintaining an overly-broad and discriminatory rule that prohibited employees from speaking to agents of the Union.

(c) Creating an impression among its employees that their union activities or other protected concerted activities were under surveillance by the Respondent.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[17]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Post Tension of Nevada, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Orally promulgating and maintaining an overly-broad and discriminatory rule that prohibits employees who are working from telling striking employees where crews of the Respondent's employees are working.

[17] Counsel for the Union, in a document entitled "Notice of Appearance" dated August 13, 2008, and received by me over a week after the hearing concluded, includes a "request for extraordinary remedies." A certificate of service attached to the document shows service upon both counsel for the General Counsel as well as counsel for the Respondent. However, in the document, counsel for the Union fails to give any reasons why any of the extraordinary remedies requested should be ordered in this case. Counsel for the Union did not file a separate posthearing brief, but, rather, joins in the brief filed by counsel for the General Counsel, which brief does not request any extraordinary remedies. As I am unaware of any reason why extraordinary remedies should be ordered in this case, I hereby deny the Union's request. I will order notice posting in both English and Spanish, but such a requirement, appropriate under the circumstances of a large number of Spanish speaking employees, is hardly extraordinary. For the purpose of providing a complete record of these proceedings, I will receive counsel for the Union's "Notice of Appearance" into evidence as CP Exh. 1.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Orally promulgating and maintaining an overly-broad and discriminatory rule that prohibits employees from speaking to agents of the Union.

(c) Creating an impression among its employees that their union activities or other protected concerted activities are under surveillance by the Respondent.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix"[19] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 10, 2008.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."